No. 92-1490

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JEAN LORELLE BURKE,

Petitioner,

—v.—

ROBERT E. JACOBY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Second Circuit follow this Court's applicable decisions when it concluded that a claim for violation of Section 10(b) of the Securities Exchange Act of 1934 cannot survive a motion for summary judgment where there is no evidence that the plaintiff suffered any loss as a result of alleged misrepresentations and omissions?

2. Is there any basis for this Court to exercise its power of supervision to require the Second Circuit to certify a question of settled law to New York State's highest appellate court?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 981 F.2d 1372. For the Court's convenience, a copy of the slip opinion is included in the Appendix to this Brief, beginning at page A1.[1]

1 Citations to the Appendix are in the form "A____."

STATUTES INVOLVED

In addition to the statutes and regulations identified in the Petition for a Writ of Certiorari, dated March 12, 1993 (the "Petition"), this case involves New York Business Corporation Law Section 623, a copy of which is included in the Appendix to this Brief, beginning at page A19.

STATEMENT OF THE CASE

Factual Background[2]

Until August 1986, Ted Bates Worldwide, Inc. (Bates) was an employee-owned advertising company. Respondent Robert E. Jacoby was Bates' President, Chairman of the Board and Chief Executive Officer, positions he had held since the early 1970's. Petitioner was a vice president of the company.

Bates had two classes of stock—Class A and Class B. Bates' CEO had unrestricted authority to decide which employees could purchase Bates' Class A shares. A Stockholders Agreement otherwise restricted the transfer of the Class A shares. Those shares could be resold only to Bates, or to designated employees, at "book value," a price calculated by dividing Bates' net asset value by the number of Class A shares outstanding. In August, 1986, petitioner Jean Lorelle Burke owned 700 shares of Class A stock. Jacoby owned 27,750 Class A shares. He also held options covering an additional 80,000 Class A shares. A shareholder resolution adopted in 1982 had authorized those options. A3.

Jacoby also owned all 30,000 shares of Bates' Class B stock. The Stockholders Agreement restricted transfer of the Class B stock as well, fixing the resale price at 50¢ per share.

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2 This description of the facts and of petitioner's lawsuit tracks the description provided by the United States Court of Appeals for the Second Circuit. *See* A3-A8.

Under Bates' Certificate of Incorporation, each Class A share had one vote. Fewer than 500,000 Class A shares were outstanding in August 1986. Each of the 30,000 Class B shares had 50 votes. Jacoby, with more than 1,500,000 votes, could exercise voting control of the company.

In August 1986, Saatchi & Saatchi Company, PLC (Saatchi) acquired Bates by merger. The Acquisition Agreement set the terms of the merger, providing that: (i) before the closing, Bates would redeem 22,788 Class A shares for $17.4 million and would redeem Jacoby's 30,000 Class B shares for $40 million; (ii) prior to the closing, Bates could sell 30,000 additional Class A shares to 23 named employees; and (iii) Saatchi would pay a total of $450 million in cash to persons who, at the time of the closing, held Class A shares or options. Each holder of Class A stock would receive approximately $853.00 per share: $765.3953 per share upon closing, and an additional $87.6286 per share two years later. Holders of stock options would receive the same price per share, minus the exercise price of the option. The Acquisition Agreement provided appraisal rights for stockholders who dissented. A4.

On May 8, 1986, Bates' Board of Directors unanimously approved the Acquisition Agreement and recommended that the shareholders adopt it at the upcoming shareholders meeting. Petitioner learned of the proposed acquisition and merger shortly after the Board approved it. She was expecting the acquisition to be presented at the upcoming shareholders meeting, and was hoping to make a lot of money on the deal.

A "full house" attended the shareholders meeting on May 22, 1986. Petitioner testified that the shareholders were "full of anticipation and hope"; the atmosphere was one of "tailwagging excitement."

At the meeting, Jacoby, as Chairman of Bates' Board, presented the terms of the Acquisition Agreement, as described above, to the shareholders.

Jacoby read from a script, drafted and approved in advance by Bates' legal counsel and financial officers. Jacoby noted that, if Saatchi did not acquire Bates, the book value of the Class A stock at the end of the fiscal year would be $390 per share. Slides, prepared by Bates' Finance Department and projected onto a large screen, accurately illustrated the terms of the proposed merger. When the slide showing the Class A price of $853 per share appeared on the screen, the shareholders, including Burke, applauded. A4. With respect to the Class B stock redemption, Jacoby stated: "We have had a separate outside investigation by a respected investment banking house, Lazard Freres, and they have stated that the price to be paid for Class B shares which will be redeemed at or prior to closing for $40,000,000 is a fair one."[3] A4.

Jacoby read the resolutions, prepared by Bates' counsel Cahill Gordon & Reindel, to approve the merger. Petitioner and Bates' other shareholders then voted without dissent to approve the Acquisition Agreement and to terminate the Stockholders Agreement, effective upon consummation of the merger. A4-A5. The verbatim text of Jacoby's statement to the shareholders was preserved and was reviewed by both the District and Circuit Courts.

The closing occurred approximately $2^1/_2$ months later, on August 7, 1986. During that time, the Acquisition Agreement, which had been available at the May 22 shareholders meeting, remained available for petitioner to review. Petitioner made no effort to do so.[4] She did not object to any of the Agreement's terms or take any action to block the closing.

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3 The exact words of the Lazard Freres opinion were that "$40,000,000 is reasonable consideration to pay" for the Class B shares.

4 Despite the Agreement's availability, petitioner first looked at it four years later, during her deposition in this case in May 1990.

Before the closing, petitioner learned that two secretaries, whom she did not consider qualified to own Bates stock, were being allowed to acquire Class A shares. The Acquisition Agreement provided for those sales to the secretaries along with 21 other named employees. A4, A18. Petitioner did not object or take any action to try to stop those stock sales.

Shortly before the closing on August 7, 1986, petitioner and each of Bates' other shareholders signed a Letter of Transmittal, necessary to arrange for payment. Petitioner did so without objection.

Pursuant to the Acquisition Agreement, Jacoby received a total of $112.6 million: $40 million for his 30,000 Class B shares; $23.6 million for his 27,750 Class A shares; and $49 million for his Class A stock options. For her 700 shares, petitioner received exactly the amounts per share that Jacoby had told her at the May 1986 shareholders meeting she would receive. A5. Petitioner accepted her first payment on August 7, 1986, without objection. She received her second and final payment on August 7, 1988, two years after the closing (as provided by the Acquisition Agreement), again without objection. Petitioner never objected or took any action until she sued Jacoby in March 1989.

Petitioner's Lawsuit

Petitioner, alone, sued Jacoby for only money damages, claiming violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, allegedly committed in 1982 and 1986. Her complaint also alleged fraud, breach of fiduciary duty and breach of Bates' Stockholders Agreement in connection with Saatchi's acquisition of Bates. Petitioner's original and amended complaints are each styled as a "class action." However, petitioner never sought to certify a class during the $2^1/_2$ years that the case was pending in the District Court. No former Bates shareholder ever sought to intervene,

despite wide-spread publicity of the lawsuit. And no former shareholder has ever started any other action against Jacoby.

Following extensive discovery, petitioner moved for partial summary judgment on her claim that Jacoby had breached the Stockholders Agreement when he received $40 million for his Class B shares. Jacoby cross-moved for summary judgment dismissing the entire complaint, principally on the grounds that there was no evidence that any of the alleged misrepresentations or omissions had caused petitioner injury and because New York law barred her state law claims.

The District Court denied petitioner's motion for summary judgment and granted Jacoby's motion in its entirety, dismissing all counts of the complaint. A6-A8. Before ruling, the District Court invited petitioner to submit a post-argument affidavit (A6), thereby giving her yet another opportunity to explain how Jacoby's disclosure had injured her. Her three-paragraph affidavit is reproduced in its entirety at pages 51a-52a of the Petition to this Court.

The District Court dismissed the allegations of securities fraud in connection with the Saatchi merger because there was no evidence that any alleged misrepresentation or omission had caused petitioner any injury. Rather, petitioner's own statements to the District Court show that she continued to approve of the merger, conceding that the purchase price was "'in all respects fair and adequate' (Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 54)" (A14), that "the total sale price was an 'excellent' one (P. Mem. in Opp'n to Summ. J. at 1) and that she is not 'dissenting from' the merger (*id.* at 54)." A7.

The District Court rejected petitioner's state law challenge to the redemption of the Class B shares as well. The Court ruled that since Burke had approved of the merger and had disavowed any desire to rescind the transaction—not wishing to give up the huge premium over book value she had received from Saatchi in payment for her shares—she was not entitled

to challenge only that part of the transaction which resulted in the payment to Jacoby for his Class B shares. A8.

On appeal to the United States Court of Appeals for the Second Circuit, Burke reiterated that "[p]laintiff approves of the merger and the price which Saatchi paid for the Company (Burke brief on appeal at 39 n.16)," and pursued her attempt to have much of Jacoby's payment redistributed to other Class A stockholders. A8.

The Second Circuit affirmed the District Court's grant of summary judgment to Jacoby in all respects. After carefully analyzing the District Court's decision and the entire record, the Second Circuit, in an opinion by Circuit Judge Amalya Kearse, ruled that:

> "*The record thus contains no evidence whatever from which a reasonable juror could conclude that any of the alleged misrepresentations or omissions caused Burke any loss*. Accordingly, the District Court properly dismissed the timely asserted securities claims for lack of evidence of causation."

A15 (emphasis supplied).

With respect to Burke's claim that Jacoby breached his fiduciary duty by accepting $40 million for his Class B shares, the Second Circuit followed established New York statutory and case law and affirmed the District Court's ruling that appraisal and an action for equitable relief are the only remedies available to a shareholder who is dissatisfied with a merger. A15-A17.

The Second Circuit also affirmed the dismissal of each of petitioner's remaining claims, none of which are presented in the Petition. As with petitioner's allegations of federal securities fraud, the Second Circuit found that petitioner had presented *no evidence* to support essential elements needed for those other claims. A11, A17-A18.

REASONS FOR DENYING THE WRIT

The Petition does not identify a single special or important reason for granting a Writ of Certiorari. It misrepresents the record and the Second Circuit's findings in significant respects.

The Second Circuit's affirmance of summary judgment in respondent's favor adhered to this Court's standards and did not conflict with decisions of the other circuit courts. The Second Circuit did not abuse its discretion when it applied settled statutory law, as construed by New York State's highest appellate court, to affirm the District Court instead of certifying a question to New York State's Court of Appeals. There is no basis or reason for this Court to exercise its supervisory power. The Petition should be denied.

I. Petitioner's inaccurate presentation of her case provides an independent basis for denying her Petition.

The Petition is replete with factual misrepresentations and inaccuracies. Five glaring examples are illustrative:

1. Petitioner states that she brought her case as a class action. Pet. at 1-2.[5] However, she fails to inform this Court that she never sought to certify a class. Nonetheless, petitioner criticizes the Second Circuit for focusing exclusively on petitioner rather than on the shareholders as a group. Pet. at 6-7. Without any evidence, she attempts to trade on what other shareholders *might* have done (Pet. at 11), even though no other shareholder is a party.

2. Petitioner claims that respondent "surreptitiously" awarded stock options to himself in 1982. Pet. at 2. The record shows that Jacoby's options were "authorized by a shareholder resolution" in 1982 (A3), that Jacoby had told the shareholders he would receive stock options, and that petitioner "knew in 1982 that the stock option plan had

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5 Citations to the Petition are in the form "Pet. at ____."

been approved by the stockholders and that . . . Jacoby had been awarded options." A10.

3. Petitioner claims that Jacoby "concealed" the number of options he held. Pet. at 3. The record is directly contrary. As the Second Circuit found: "[Burke] has come forward with no evidence of any form of concealment on the part of Jacoby." A11.

4. Petitioner claims that "both [the District and Circuit] Courts below acknowledged the materiality as well as the falsity of the challenged statement and omissions." Pet. at 9. The record clearly shows that neither the District Court nor the Second Circuit made any finding of materiality and that neither Court concluded that any statement was false. Pet. at 39a; A13, A18.

5. Petitioner claims that the redemption of Jacoby's Class B shares "contravened" the Stockholders Agreement (Pet. at 2), but she does not inform the Court that the Stockholders Agreement restricted the transfer of *both* the Class A *and* Class B shares. She also fails to tell the Court that, because of those restrictions, she and the other shareholders voted to rescind the Stockholders Agreement, and acknowledged that termination in writing, so they could receive the huge premium over book value that Saatchi offered. A4-A5, A17.

These inaccuracies and others that abound in the Petition are an independent reason for dismissing the Petition pursuant to Supreme Court Rule 14.5.

II. The Second Circuit's decision conforms with this Court's applicable standards.

Properly stated, the first issue presented to the Court is whether the Second Circuit followed this Court's decisions regarding summary judgment. The Second Circuit correctly identified and applied the proper standards.

This Court has recognized that summary judgment is appropriate when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party . . . ." *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is required if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986).

The Second Circuit correctly applied the standard for summary judgment when it affirmed the District Court's dismissal of petitioner's claims for securities fraud because the record, developed after exhaustive discovery, contains no evidence to support a finding that an alleged misrepresentation or omission caused any loss to petitioner. As the Second Circuit stated:

> "The record thus contains no evidence whatever from which a reasonable juror could conclude that any of the alleged misrepresentations or omissions caused Burke any loss. Accordingly, the district court properly dismissed the timely asserted securities claims for lack of evidence of causation."

A15.

The Second Circuit's decision is firmly rooted in the record which, taken as a whole, shows that petitioner did not suffer any loss as a result of the alleged misrepresentations or omissions. There is no evidence to link Jacoby's disclosure to an identified loss. Rather, there are petitioner's repeated affirmative statements, both in the District and Circuit Courts, that she "approves of the merger" and is not "dissenting from" it. A7, A8, A14, A17; Pet. at 39a. The record further shows that petitioner received the exact per share amounts that Jacoby had told her she would receive, the same amounts required by the Acquisition Agreement. A4-A5.

Petitioner could not have received any larger amount unless she first dissented from the merger, an action she has repeatedly rejected. As the Second Circuit stated:

> "The record supports the district court's view that *Burke had come forward with no evidence that the claimed misrepresentations or omissions caused her any injury*, for she concedes that, whatever importance she might have placed on the undisclosed information, *she would not have performed the act that was necessary to obtain a better price for her shares than she received, i.e., dissent from the merger, either to impede its consummation or to obtain an appraisal of her shares.*"

A14 (emphasis supplied).

The Second Circuit cataloged petitioner's many opportunities to provide some evidence linking the alleged misrepresentations and omissions to some loss. Petitioner failed to identify any such evidence.

> "Burke had every opportunity in this litigation to state, if she could do so in good faith, that she would have dissented from the acquisition if she had known the facts she contends were misrepresented or concealed. In addition to the ordinary opportunity to present her case in opposition to Jacoby's motion for summary judgment, she was invited by the court at oral argument to represent, under oath, if she could do so in good faith, that she would not have sold her shares. In response, Burke's affidavit stated that she would have objected to 'the allocation of the proceeds of the merger'; but *she did not state that she would have dissented, which would have required her to forgo the large profit to be had on her own shares.*"

A14 (emphasis supplied).

The Petition perpetuates this failure. It merely speculates that petitioner and the other Bates shareholders might have "objected" to the redemption of the Class B shares, and some-

how forced Jacoby to distribute those monies to the shareholders, if they had known that Lazard Freres' opinion referred to the $40 million paid to redeem the B shares as "reasonable consideration" rather than as a "fair price." Pet. at 11. However, petitioner has never identified any action that she might have taken to restructure the merger or renegotiate some of its terms. And petitioner has never provided any proof that such action likely would have resulted in a re-allocation of the proceeds of the merger. *Cf. Madison Consultants* v. *Federal Deposit Insurance Corp.*, 710 F.2d 57, 64-65 & n.6 (2d Cir. 1983) (to prove causation, plaintiff must identify an available means of protection and show that, had he pursued such means, he would have succeeded).

Petitioner had a single investment decision: to approve the merger and receive a huge premium for her shares or to dissent from it—an option she has expressly rejected. A7, A8, A14. Moreover, what other shareholders might have done is irrelevant. Petitioner was the only plaintiff. No class was ever certified.

Ignoring this Court's summary judgment standards and unable to point to any evidence that the Second Circuit overlooked, petitioner claims that the Second Circuit failed to follow *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972). *See* Pet. at 8-9. To the contrary, the Second Circuit cited, quoted and correctly applied *Affiliated Ute*. A12-A13.

The Second Circuit's analysis of petitioner's allegations of securities fraud first identified the elements of a claim:

> "[A] plaintiff must show, *inter alia*, that the defendant, with scienter, made a misrepresentation of material fact or failed to disclose a material fact, and that the plaintiff relied on the misrepresentation or omission and suffered a loss as a result of the misrepresentation or omission."

A11.

The Second Circuit noted that courts sometimes refer to the reliance element as "transaction causation" and the causation element as "loss causation." A11-A12. Proof of reliance requires a showing that the alleged misrepresentations or omissions caused the plaintiff to engage in the transaction; proof of loss causation requires a showing that the alleged misrepresentations or omissions caused economic harm to the plaintiff.[6] *See, e.g., Bennett* v. *United States Trust Co.*, 770 F.2d 308, 313 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986).

The Second Circuit then recognized that, under *Affiliated Ute*, when omissions are claimed, a plaintiff's proof of materiality creates a presumption that can satisfy plaintiff's burden of proving reliance. A12-13.

However, since the record contained "no evidence whatever" that petitioner suffered a loss due to a misrepresentation or omission, the Second Circuit recognized that there was no proof of the essential element of loss causation. Thus, the Court concluded that any questions of fact which might exist with respect to materiality or reliance become irrelevant to deciding the summary judgment motion:

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6 The Second Circuit has frequently used this analysis in deciding securities fraud claims. *See, e.g., Wilson* v. *Ruffa & Hanover*, 844 F.2d 81, 85 (2d Cir. 1988), *aff'd on rehearing sub nom. Wilson* v. *Saintine Exploration & Drilling Corp.*, 872 F.2d 1124 (2d Cir. 1989); *Bennett* v. *United States Trust Co.*, 770 F.2d 308, 313 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). Other circuits have adopted this analysis. No circuit court has rejected it. *See, e.g., Carlton* v. *Franklin*, 911 F.2d 721 (4th Cir. 1990) (unpublished decision reported at 1990 U.S. App. LEXIS 12946); *Huddleston* v. *Herman & MacLean*, 640 F.2d 534, 549 & n.24 (5th Cir. Unit A 1981), *aff'd in part, rev'd in part on other grounds*, 459 U.S. 375 (1983); *LHLC Corp.* v. *Cluett, Peabody & Co., Inc.*, 842 F.2d 928, 931 (7th Cir.), *cert. denied*, 488 U.S. 926 (1988); *Arthur Young & Co.* v. *Reves*, 937 F.2d 1310, 1327-28 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1165 (1992); *McGonigle* v. *Combs*, 968 F.2d 810, 820-21 (9th Cir.), *cert. dismissed sub nom. Casares* v. *Spendthrift Farm, Inc.*, 113 S. Ct. 399 (1992); *Currie* v. *Cayman Resources Corp.*, 835 F.2d 780, 785 (11th Cir. 1988).

> "[Q]uestions of materiality and reliance are not issues of material fact in the context of the summary judgment granted in the present case because, as we read the district court's opinion, the court dismissed Burke's federal securities claims—whether based on affirmative misrepresentation or omission—for lack of proof of loss causation."

A13-A14 (citations omitted).

The Second Circuit followed this Court's summary judgment standards, stating that:

> "If the undisputed facts reveal that there is an absence of sufficient proof as to one essential element of the claim, any factual disputes with respect to other elements of the claim become immaterial and cannot defeat a motion for summary judgment."

A13.

In this Court's own words:

> "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."

Celotex Corp. v. *Catrett*, 477 U.S. at 322-23.

Faced with petitioner's repeated statements to the District and Circuit Courts that she "approves of the merger" and, even today, is not "dissenting from" it (A7, A8), no reasonable juror could conclude that any alleged misrepresentation or omission caused petitioner any loss. The Second Circuit properly affirmed the District Court's grant of summary judgment in Jacoby's favor.

III. There is no basis for this Court to exercise its power of supervision to require the Second Circuit to certify a question of settled law to the New York State Court of Appeals.

The Second Circuit applied the plain language of the New York Business Corporation Law (BCL) § 623(k) and case law established by New York's highest court to affirm the District Court's dismissal of petitioner's state-law claim of breach of fiduciary duty. A15-A17. There was no reason for the Circuit Court to certify any question to the New York State Court of Appeals because there was no unsettled issue of state law.

The New York State Court of Appeals permits certification only when there is no controlling state law precedent:

> "Whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state that determinative questions of New York law are involved in a cause pending before it *for which there is no controlling precedent of the Court of Appeals*, such court may certify the dispositive questions of law to the Court of Appeals."

New York Rules of Court § 500.17(a) (emphasis supplied). *See also* Rules of the United States Court of Appeals for the Second Circuit § 0.27 (certification limited to "unsettled" questions of state law).

In this case, the Second Circuit applied settled state law. The Circuit Court recognized that, under established New York law, an appraisal proceeding and an "appropriate action" are the exclusive remedies available to a shareholder who is dissatisfied with the payment offered for her shares in a merger. A15. Under New York law, an "appropriate action" within the meaning of BCL § 623(k) is one seeking equitable relief. A15 (citing *Walter J. Schloss Associates* v. *Arkwin Industries, Inc.*, 61 N.Y.2d 700, 472 N.Y.S.2d 605 (1984) (adopting dissenting opinion of Mangano, J., in the Appellate Division as the New

York State Court of Appeals' opinion (90 A.D.2d at 153-62, 455 N.Y.S.2d at 847-52)) (*Schloss*); *Breed* v. *Barton*, 54 N.Y.2d 82, 444 N.Y.S.2d 609 (1981)). *See also Cawley* v. *SCM Corp.*, 72 N.Y.2d 465, 471, 534 N.Y.S.2d 344, 347 (1988); *Alpert* v. *28 Williams St. Corp.*, 63 N.Y.2d 557, 568, 483 N.Y.S.2d 667, 673 (1984). A claim for money damages is barred unless it is made "ancillary to a grant of traditionally equitable relief." A16 (citing *Schloss*, 90 A.D.2d at 160, 455 N.Y.S.2d at 851).

Petitioner never sought equitable relief or appraisal. To pursue those remedies in the hope of getting more money, petitioner would have had to forego the huge premium Saatchi agreed to pay for her shares. Instead, petitioner sought only money damages. As the Second Circuit concluded, BCL § 623(k) and *Schloss* preclude such an action:

> "*An action for damages alone will not lie, since this would allow a dissenting shareholder, by merely alleging fraudulent or unlawful corporate conduct, to seek therein the identical relief available to him in appraisal proceedings.* . . . Consequently, an action for damages by a minority shareholder based on the fraudulent or illegal corporate conduct of the majority in discharging its fiduciary duty would be unnecessarily duplicative."

A16 (quoting *Schloss*, 90 A.D.2d at 161, 455 N.Y.S.2d at 851) (emphasis supplied).

Petitioner's complaint that she did not receive notice of her appraisal right is a red herring. Petitioner has always insisted that she "approves of the merger" and is not "dissenting from" it. A7, A8, A14. Petitioner's own claims moot both the notice and appraisal issues. In any event, New York law is clear. Inadequate notice does not create a claim for money damages. It merely preserves a right to appraisal. *See, e.g.*, BCL § 623(a); *Carroll* v. *Seacroft, Ltd.*, 141 A.D.2d 726, 727-28, 529 N.Y.S.2d 829, 830 (2d Dep't 1988); *Rank Organization Ltd.* v. *Pathe Laboratories, Inc.*, 33 Misc. 2d 748, 753-54, 227 N.Y.S.2d 562, 567-68 (Sup. Ct. N.Y. County 1962).

This Court has acknowledged that certification of a question to a state court is a matter of discretion:

> "We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory . . . . Its use in a given case rests in the sound discretion of the federal court."

Lehman Brothers v. *Schein*, 416 U.S. 386, 390-91 (1974). A federal court's refusal to certify a question to a state court should not be disturbed unless there is a clear abuse of discretion. *See, e.g., Johnson* v. *John Deere Co.*, 935 F.2d 151, 154 (8th Cir. 1991); *Federal Deposit Insurance Corp.* v. *Ponce*, 904 F.2d 740, 746 (1st Cir. 1990). Even petitioner does not claim that the Second Circuit abused its discretion, but only that the Second Circuit's decision not to seek certification was "dubious." Pet. at 15.

The Second Circuit's decision not to certify a question in connection with settled issues of New York State law was well within its discretion. Petitioner has no basis to invoke the exercise of this Court's power of supervision.

CONCLUSION

The Second Circuit's decision adheres to decisions of this Court. It does not conflict with decisions of other circuit courts. There is no basis or reason for this Court to exercise its power of supervision. The Petition should be denied in all respects.

Dated: New York, New York
April 12, 1993

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1063—August Term, 1991

(Argued: March 4, 1992 Decided: December 29, 1992)

Docket No. 91-9148

JEAN LORELLE BURKE,

Plaintiff-Appellant,

—v.—

ROBERT E. JACOBY,

Defendant-Appellee.

Before:

KEARSE and ALTIMARI, *Circuit Judges*,
and TELESCA, *Chief Judge**.

Appeal from a judgment of the United States District Court for the Southern District of New York, Miriam Goldman

* Honorable Michael A. Telesca, Chief Judge of the United States District Court for the Western District of New York, sitting by designation.

Cedarbaum, *Judge*, dismissing complaint charging federal securities fraud and state law violations.

Affirmed.

RICHARD M. MEYER, New York, New York (Lee S. Shalov, Milberg Weiss Bershad Specthrie & Lerach, New York, New York, on the brief), *for Plaintiff-Appellant.*

JOHN HARTJE, New York, New York (A. Kaiper Wilson, Robert S. Shwarts, Kronish, Lieb, Weiner & Hellman, New York, New York, on the brief), *for Defendant-Appellee.*

KEARSE, Circuit Judge:

Plaintiff Jean Lorelle Burke, a former employee and stockholder of Ted Bates Worldwide, Inc. ("Bates" or the "Company"), appeals from a final judgment of the United States District Court for the Southern District of New York, Miriam Goldman Cedarbaum, *Judge*, dismissing her complaint for damages against defendant Robert E. Jacoby under § 10(b) of the Securities and Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78j(b) (1988), Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (1992), and state law, alleging misrepresentations, omissions, breach of contract, and breaches of fiduciary duty in connection with the acquisition of Bates by another company. The district court granted summary judgment dismissing the complaint principally on the grounds (1) that certain of the alleged omissions concerned facts already known by Burke, (2) that Burke failed to

come forward with evidence that she had relied on the alleged misrepresentations or omissions or that they had caused her claimed loss, and (3) that certain of her claims were barred by the statute of limitations. On appeal, Burke contends, *inter alia*, that the district court applied erroneous legal standards of reliance and causation in assessing her federal securities claims and that partial summary judgment should have been entered in her favor on the breach-of-contract claim. She also argues that the district court's statute-of-limitations ruling with respect to one of the federal securities claims must be set aside in light of a recent amendment to the 1934 Act. For the reasons below, we reject her contentions and affirm the judgment of the district court.

I. BACKGROUND

A. *The Bates-Saatchi Merger*

Prior to August 1986, Bates was an employee-owned advertising company. Jacoby was its president, chairman, and chief executive officer, as well as its controlling stockholder. Bates had two classes of stock. Class A was issued to key executives of the Company. A "Stockholders Agreement" limited the transferability of such stock, permitting its resale only to the Company, or to designated employees, at a price calculated principally by dividing the Company's net asset value by the number of Class A shares outstanding. Burke owned 700 shares of the Class A stock. Jacoby owned 27,750 Class A shares; in addition, as authorized by a shareholder resolution adopted in 1982, he had options covering 80,000 Class A shares.

All of the Bates Class B stock, of which there were 30,000 shares, was owned by Jacoby. The Stockholders Agreement also restricted transfer of the Class B stock, the repurchase price of which was fixed at $.50 per share. Under the certifi-

cate of incorporation, each Class A share, of which fewer than 500,000 were outstanding, had one vote; each of the 30,000 Class B shares had 50 votes. Thus, Jacoby, with more than 1,500,000 votes, had voting control of the Company.

In August 1986, Bates was acquired by Saatchi & Saatchi Company, PLC ("Saatchi"). The Acquisition Agreement, approved by the Bates stockholders in May 1986, principally (1) required Bates prior to the closing (a) to redeem 22,788 Class A shares for $17.4 million, and (b) to redeem Jacoby's 30,000 Class B shares for $40 million; (2) allowed Bates prior to the closing to sell some 30,000 Class A shares to approximately 20 employees; and (3) required Saatchi to pay a total of $450 million in cash to persons who, at the time of the closing, held Class A shares or options. Each holder of Class A stock was to receive $765.3953 per share upon completion of the acquisition, plus $87.6286 per share two years later, for a total of approximately $853 per share. Holders of stock options were to receive the same price per share, minus the exercise price of the option. The Acquisition Agreement also provided appraisal rights for stockholders who dissented.

At the May 1986 stockholders' meeting, Jacoby spelled out the above terms, noting that, absent the acquisition, the book value of the Class A stock at the end of the fiscal year would be $390 per share. When he announced the acquisition price of approximately $853 per Class A share, the stockholders, including Burke, applauded. As to the Class B stock repurchase, Jacoby stated, "We have had a separate outside investigation by a respected investment banking house, Lazard Freres, and they have stated that the price to be paid for Class B shares which will be redeemed at or prior to closing for $40,000,000 is a fair one." The shareholders, including Burke, approved the proposed Saatchi transaction. They also unanimously approved a resolution terminating the

Stockholders Agreement, effective upon consummation of the acquisition.

Pursuant to the Acquisition Agreement, Jacoby received a total of $112.6 million, consisting of the $40 million for his 30,000 Class B shares, $23.6 million for his 27,750 Class A shares, and $49 million for his Class A stock options. For her 700 shares, Burke received the per-share amounts specified by Jacoby in the May 1986 stockholders' meeting presentation. In her letter transmitting her stock to Saatchi, Burke acknowledged that the Stockholders Agreement restricting transferability of the stock was rescinded concurrently with the consummation of the acquisition.

B. *The Present Lawsuit*

In March 1989, Burke commenced the present action for damages, alleging that Jacoby had misrepresented or failed to disclose certain material facts in connection with the Saatchi acquisition. The complaint alleged principally (a) that Jacoby had failed to disclose in 1982 that he would receive options on the Class A shares; (b) that Jacoby had failed to disclose in May 1986 that, while negotiating with Saatchi, Bates had received a competing offer that Jacoby summarily rejected; (c) that Jacoby had failed to disclose in May 1986 how many Class A stock options he held; and (d) that Jacoby had misrepresented the investment banker's opinion of the price for the Class B shares, stating that the banker had termed the price "fair," when in fact the banker had said that the price was "reasonable." The complaint also alleged, *inter alia*, that Jacoby breached his fiduciary duty (a) by accepting $40 million for his 30,000 Class B shares as, in essence, a "control premium," and (b) by having Bates sell a total of 3,500 Class A shares to two employees who were not executives but secretaries. Burke sought damages and an "accounting" of Jacoby's profits from the Saatchi transaction.

Following a period of discovery, Burke moved for partial summary judgment principally on the ground that Jacoby's receipt of $40 million for his Class B shares breached the Stockholders Agreement. Jacoby cross-moved for summary judgment dismissing the entire complaint on the grounds, *inter alia*, that Burke could not show that any of the alleged misrepresentations or omissions had been relied on or had caused her injury, and that she was not entitled to damages on any of her state-law claims.

After receiving voluminous papers and hearing oral argument, and after inviting and receiving a postargument affidavit from Burke, the district court granted Jacoby's motion for summary judgment and denied Burke's motion. In a Memorandum Opinion and Order dated October 10, 1991 ("Opinion"), the court ruled that insofar as Burke's securities claims rested on events that occurred in 1982, they were barred by the one year/three year statute of limitations adopted in *Ceres Partners v. GEL Associates*, 918 F.2d 349 (2d Cir. 1990) (one year from discovery, but not more than three years from occurrence), and *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991) (same), and made retroactive by *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991). As set forth below, the court dismissed the remaining securities claims on the ground that Burke had not come forward with evidence of reliance or causation, noting that Burke "does not assert that she would have voted against the merger even if she had been aware of the extent of [Jacoby]'s self-dealing, and even now, she does not wish to undo the merger." Opinion at 2.

As to the claim based on Jacoby's statement that the investment banker had said that $40 million was a "fair," instead of a "reasonable," price for the Class B stock, the court stated that Burke failed to show that the "misrepresentation complained of was at least a 'but for' cause of the transaction

in question," Opinion at 12, and that there was "no evidence of loss causation," noting as follows:

> At the oral argument of this motion, I invited Burke's counsel to submit evidence, in the form of an affidavit from Burke, that she relied upon Jacoby's description of Lazard's opinion in deciding to sell her shares. (*See* Hearing Tr. at 19-20.) In response, Burke submitted an affidavit stating only: "Had I known of the falsity of that representation, I would have objected to the allocation of the proceeds of the merger on the terms then set forth." She does not state that she would have dissented from the merger. Thus, since there is no evidence of loss causation, an essential element of a claim of fraud in connection with the purchase or sale of securities, Jacoby's motion for summary judgment on this part of the Section 10(b) claim is granted.

Opinion at 12. As to the claimed omissions, the court observed that Burke

> has never stated that she would have voted against the merger even if she had been apprised of Jacoby's option holdings or potential profit on them, despite my invitation for her to do so. (*See* Hearing Tr. at 19-20; Burke Aff.) On the contrary, she has maintained the position that the total sale price was an "excellent" one (P. Mem. in Opp'n to Summ. J. at 1) and that she is not " 'dissenting from' " the merger (*id.* at 54).

Opinion at 14-15; *see id.* at 17 (as to the third-party offer to buy the Bates stock, "[a]gain . . . plaintiff has made no showing that she would have voted against the merger had she been in possession of the information" and hence "has failed to make the requisite showing of loss causation"). The court noted that a § 10(b) plaintiff "must establish that the

misrepresentations complained of caused the injury suffered," Opinion at 15, and concluded that

> although there may be a genuine issue of material fact as to whether the omission plaintiff complains of was material and misleading, there is no evidence that it affected her vote or her desire to sell her shares. Thus, the misrepresentation cannot be said to have caused the alleged injury.

Id.

The court also ruled, *inter alia*, that since Burke disavowed any desire to rescind the transaction, not wishing to forgo what she had received in the transaction, she was not entitled to challenge that part of the transaction that resulted in the payment to Jacoby for his Class B shares.

Judgment was entered dismissing the complaint, and this appeal followed.

II. DISCUSSION

On appeal, Burke, stating that "[p]laintiff approves of the merger and the price which Saatchi paid for the Company" (Burke brief on appeal at 39 n.16), pursues her attempt to have much of the payment received by Jacoby redistributed to other Class A stockholders. She contends principally that, in light of an amendment to the 1934 Act, her securities claim based on the 1982 stock options is not barred by the statute of limitations; that the district court applied erroneous legal standards of reliance and causation to her other federal securities claims; that the court erred in ruling that statutory appraisal was her only remedy for the claim that Jacoby breached his fiduciary duty to Bates shareholders by receiving $40 million for his 30,000 Class B shares; and that the court erred in not ruling that as a matter of law the $40 million

payment to Jacoby for his Class B shares breached the Stockholders Agreement. For the reasons below, we find no basis for reversal.

A. *The Statute of Limitations on the 1982 Nondisclosure Claim*

Burke contends that notwithstanding the one year/three year limitations period for claims under Rule 10b-5 established by *Ceres Partners v. GEL Associates*, 918 F.2d 349 ("*Ceres*"), and *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, and the ruling in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, requiring that the one year/three year rule be applied retroactively, her claims based on 1982 events have been revived by the recently enacted § 27A of the 1934 Act, 15 U.S.C.A. § 78aa-1 (West Supp. 1992), which modifies the retroactivity of the one year/three year rule. Her reliance on § 27A is misplaced.

Section 27A(b) provides that the limitation period for a claim under § 10(b) or Rule 10b-5

> commenced on or before June 19, 1991 – (1) which was dismissed as time barred subsequent to June 19, 1991, *and (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction*, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff.

15 U.S.C.A. § 78aa-1(b) (West Supp. 1992) (emphasis added). As indicated by the language emphasized, this section does not authorize reinstatement of a claim that would have been time-barred under the principles applicable on June 19, 1991. Leaving aside the question of whether, in light of § 27A(b), the *Ceres* rule, adopted by this Court prior to June 19, 1991, is to have retroactive application to claims filed

prior to the *Ceres* decision, *see Henley v. Slone*, 961 F.2d 23, 25-26 (2d Cir. 1992), that section affords Burke no relief, for her claim was time-barred even under pre-*Ceres* precedent. *See generally Grondahl v. Merritt & Harris, Inc.*, 964 F.2d 1290, 1292-93 (2d Cir. 1992) (no need to analyze applicability of *Ceres* if claim would also have been barred under pre-*Ceres* rule).

Prior to *Ceres*, a Rule 10b-5 action that accrued in New York and was brought in a district court within New York was time-barred in this Circuit if not brought "within six years from the time the cause of action accrued or within two years from the time the wrongdoing was, or with reasonable diligence should have been, discovered." *Armstrong v. McAlpin*, 699 F.2d 79, 87 (2d Cir. 1983); *see also Stull v. Bayard*, 561 F.2d 429, 431-32 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978). Here Jacoby's allegedly wrongful acquisition of stock options occurred in May 1982. The issuance of such options was approved at the 1982 annual meeting of stockholders, and Jacoby disclosed at that meeting that he was one of the employees who would receive options pursuant to the plan. Though Burke claims that she did not know in 1986 how many options Jacoby held, she does not dispute that she knew in 1982 that the stock option plan had been approved by the stockholders and that she knew in 1982 that Jacoby had been awarded options. The claim in the present action that Jacoby violated the securities laws in 1982 by not informing stockholders prior to their approval of the stock option plan that he intended to award himself 80,000 shares was not asserted until 1989, more than six years after the options were issued and more than six years after Burke knew that some options had been awarded. Thus Burke's claim would have been untimely even prior to the adoption of the one year/three year limitations period in *Ceres*. Accordingly, even if *Ceres* were not to be applied retroactively to claims pending at the

time of its decision, § 27A(b) does not authorize reinstatement of Burke's claim.

Burke's contention that even the six-year limitations period should not bar her claim because of principles of equitable estoppel has no merit. The record plainly reveals that Burke had sufficient facts to inquire, if she had been interested, into precisely how many shares were optioned to Jacoby, and she has come forward with no evidence of any form of concealment on the part of Jacoby.

B. *Reliance and Causation*

In her challenge to the dismissal of the remaining securities claims, Burke contends that the district court, in finding dispositive her failure to show that she would have dissented from the acquisition had she had full knowledge of the facts, applied erroneous standards of reliance and causation. Even if we interpreted the district court's opinion as imposing an improper standard of reliance with respect to Burke's claims of misleading omissions, the court's standard of causation was clearly proper, and hence we see no basis for reversal.

Rule 10b-5 makes it unlawful, in pertinent part, "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, . . . in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5. In order to prove a claim under § 10(b) or Rule 10b-5, a plaintiff must show, *inter alia*, that the defendant, with scienter, made a misrepresentation of material fact or failed to disclose a material fact, and that the plaintiff relied on the misrepresentation or omission and suffered a loss as a result of the misrepresentation or omission. *See, e.g., Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 61 (2d Cir. 1985). The reliance element of the claim is sometimes referred to as

"transaction causation," and the causation element is sometimes referred to as "loss causation." *See, e.g., Litton Industries, Inc. v. Lehman Brothers Kuhn Loeb Inc.*, 967 F.2d 742, 747 (2d Cir. 1992); *Bennett v. United States Trust Co.*, 770 F.2d 308, 313 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). The two concepts are closely allied, for there generally is no causation without reliance. There can, however, be reliance without causation.

A plaintiff's burden with respect to the reliance element of a Rule 10b-5 claim may vary depending on whether the claim alleges fraudulent representations or fraudulent omissions. In connection with a claim that the defendant has affirmatively made false statements, plaintiff must demonstrate that he or she relied on the misrepresentation when entering the transaction that caused him or her economic harm. *See, e.g., Wilson v. Ruffa & Hanover, P.C.*, 844 F.2d 81, 86 (2d Cir. 1988), *aff'd on reh'g sub nom. Wilson v. Saintine Exploration & Drilling Corp.*, 872 F.2d 1124 (2d Cir. 1989); *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 380 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975). In connection with a claim of material omission, however, "positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision." *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972); *see also duPont v. Brady*, 828 F.2d 75, 78 (2d Cir. 1987) (" 'in instances of total non-disclosure, . . . it is of course impossible to demonstrate reliance' ") (quoting *Titan Group, Inc. v. Faggen*, 513 F.2d 234, 239 (2d Cir.), *cert. denied*, 423 U.S. 840 (1975)). Thus, "once the plaintiff establishes the materiality of the omission by a preponderance of the evidence, the burden shifts to the defendant to establish also by a preponderance of the evidence that the plaintiff did not rely on the omission in making

the investment decision." *duPont v. Brady*, 828 F.2d at 76; *see also Litton Industries, Inc. v. Lehman Brothers Kuhn Loeb Inc.*, 967 F.2d at 748.

Summary judgment should be granted only if there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). In order to obtain that relief, the moving party need not prove that his opponent's case is wholly frivolous. When a defendant has moved for summary judgment on the ground that undisputed facts reveal that the plaintiff cannot establish an essential element of the claim, on which element the plaintiff has the burden of proof, and the plaintiff has failed to come forth with evidence sufficient to permit a reasonable juror to return a verdict in his or her favor on that element, summary judgment should be granted. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). If the undisputed facts reveal that there is an absence of sufficient proof as to one essential element of the claim, any factual disputes with respect to other elements of the claim become immaterial and cannot defeat a motion for summary judgment. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. at 322-23; *Knight v. U.S. Fire Insurance Co.*, 804 F.2d 9, 11-12 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); *Quarles v. General Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985) (per curiam).

In the present case, there may be, as the district court noted, questions of fact as to whether the alleged omissions were material, or whether the description of the Lazard Frères opinion was a material misrepresentation, in the sense that reasonable stockholders might have considered the accurate information important to their decisions as to whether or not to vote for the acquisition. And it may be, as to the claims of omissions, that the undisclosed information was material, thereby prima facie establishing reliance. But these questions of materiality and reliance are not issues of material fact in

the context of the summary judgment granted in the present case because, as we read the district court's opinion, the court dismissed Burke's federal securities claims—whether based on affirmative misrepresentation or omission—for lack of proof of loss causation. *See* Opinion at 12, 15, 17.

The record supports the district court's view that Burke had come forward with no evidence that the claimed misrepresentations or omissions caused her any injury, for she concedes that, whatever importance she might have placed on the undisclosed information, she would not have performed the act that was necessary to obtain a better price for her shares than she received, *i.e.*, dissent from the merger, either to impede its consummation or to obtain an appraisal of her shares. Burke had every opportunity in this litigation to state, if she could do so in good faith, that she would have dissented from the acquisition if she had known the facts she contends were misrepresented or concealed. In addition to the ordinary opportunity to present her case in opposition to Jacoby's motion for summary judgment, she was invited by the court at oral argument to represent, under oath, if she could do so in good faith, that she would not have sold her shares. In response, Burke's affidavit stated that she would have objected to "the allocation of the proceeds of the merger"; but she did not state that she would have dissented, which would have required her to forgo the large profit to be had on her own shares. At no point did Burke suggest that she would have voted against the acquisition had she known any or all of the facts she claims were not disclosed to her. In the district court, she termed the purchase price "in all respects fair and adequate" (Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 54); and in this Court, as noted above, she stated that she still approves of the merger.

The record thus contains no evidence whatever from which a reasonable juror could conclude that any of the alleged misrepresentations or omissions caused Burke any loss. Accordingly, the district court properly dismissed the timely asserted securities claims for lack of evidence of causation.

C. *The Challenge to the Payment for the Class B Shares*

Burke contends that the district court erred in ruling that her remedies for the claim that Jacoby breached his fiduciary duty to Bates shareholders by accepting $40 million for his 30,000 Class B shares were limited to her statutory appraisal right or equitable relief. We disagree.

In ruling that Burke was limited to her appraisal rights, the district court relied on § 623(k) of the New York Business Corporation Law, which provided that

> [t]he enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein [*i.e.*, by an appraisal proceeding] shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership, . . . except that this section shall not exclude the right of such shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is unlawful or fraudulent as to him.

New York Bus. Corp. Law § 623(k) (McKinney 1986). An "appropriate action" within the meaning of § 623(k) is an action seeking equitable relief, and that type of action and the exercise of the right of appraisal are the dissatisfied stockholder's only avenues of relief. *See Walter J. Schloss Associates v. Arkwin Industries, Inc.*, 61 N.Y.2d 700, 472 N.Y.S.2d 605 (1984) (adopting dissenting opinion of Mangano, J., at the Appellate Division as Court of Appeals opin-

ion), *rev'g* 90 A.D.2d 149, 455 N.Y.S.2d 844 (2d Dep't 1982) ("*Schloss*"); *Breed v. Barton*, 54 N.Y.2d 82, 444 N.Y.S.2d 609 (1981). Money damages are not available except as "ancillary to a grant of traditionally equitable relief." *Schloss*, 90 A.D.2d at 160, 455 N.Y.S.2d at 851. As the *Schloss* court explained:

> An action for damages alone will not lie, since this would allow a dissenting shareholder, by merely alleging fraudulent or unlawful corporate conduct, to seek therein the identical relief available to him in appraisal proceedings. For example, where, as here, there is "a forced liquidation or sale of the minority shareholders' stock incident to a merger" . . . the full and proper monetary recovery of the fair value of the dissenters' shares may be obtained in appraisal proceedings in which the discharge of the majority's fiduciary duty to the minority can be weighed in determining fair value . . . . Consequently, an action for damages by a minority shareholder based on the fraudulent or illegal corporate conduct of the majority in discharging its fiduciary duty would be unnecessarily duplicative.

Id. at 161, 455 N.Y.S.2d at 851 (footnote omitted). The equitable relief to which an award of damages could be ancillary means relief other than a so-called request for an accounting that is merely a request for damages in another form. *See id.* at 162 n.6, 455 N.Y.S.2d at 852 n.6 ("The complaint does not seek to have defendant . . . account to plaintiff as representative of the premerger corporation but appears to request an accounting and payment of improperly withheld funds by [defendant] to plaintiff in its individual capacity, revealing plaintiff's real, and, in fact stated, intent, i.e., to obtain damages.").

Burke's complaint requested compensatory and punitive damages, together with an accounting that the district court properly viewed as essentially a request for damages. Burke made no attempt to obtain traditionally equitable relief such as a rescission of the merger. As indicated above, she took the position in the district court that the purchase price was "in all respects fair and adequate," and that she was not "dissenting" from the merger. (Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 54.) Her request for an "accounting," like the request in *Schloss*, was not for equitable relief from Jacoby as to funds belonging to the Company but rather sought funds he received in his individual capacity. *Schloss* forecloses that relief.

Accordingly, we affirm the district court's dismissal of Burke's state-law breach-of-fiduciary-duty claim concerning the redemption of Jacoby's Class B stock.

D. *Other Arguments*

Burke's other challenges to the dismissal of her complaint do not require extended discussion. Her breach-of-contract claim, on which she contends the court should have granted summary judgment in her favor, was properly rejected as a matter of law. That claim relied on the Stockholders Agreement. The stockholders, however, in voting to approve the Saatchi acquisition, explicitly voted to rescind the Stockholders Agreement to coincide with the acquisition. Further, each Class A stockholder, including Burke, acknowledged the termination of the Stockholders Agreement in transmitting his or her Class A shares to consummate the acquisition. Since Burke has disavowed any desire to rescind or dissent from the acquisition, the Stockholders Agreement affords her no basis for a claim.

Burke's complaint that Class A stock was improperly issued to two of Bates's secretaries, who were not "key execu-

tive employees" entitled to such stock was also properly dismissed. A schedule attached to that Agreement listed the two secretaries and the other employees who were to receive Class A shares prior to the closing; we see no indication in the record that if any of the authorized Class A shares had not been issued to the persons listed in the schedule, they were to be issued to others such as Burke. Further, the Acquisition Agreement specified, to the hundredth of a cent, the price to be paid to stockholders for each Class A share; we see no indication that if any of the authorized shares were not issued in accordance with the schedule, the price paid for the already issued shares was to be increased. Burke presented no evidence from which an inference could be drawn that had she been notified of the sales, or had they not been made, she would have received a greater price per share. Thus, we uphold the district court's rulings that the issuance of shares to the secretaries was not material to Burke's vote on the merger, was not material to the surrender of her stock, and did not cause her any injury.

CONCLUSION

We have considered all of Burke's arguments on this appeal and have found in them no basis for reversal. The judgment of the district court is affirmed.

NEW YORK BUSINESS CORPORATION LAW § 623

§ 623. Procedure to enforce shareholder's right to receive payment for shares.—(a) A shareholder intending to enforce his right under a section of this chapter to receive payment for his shares if the proposed corporate action referred to therein is taken shall file with the corporation, before the meeting of shareholders at which the action is submitted to a vote, or at such meeting but before the vote, written objection to the action. The objection shall include a notice of his election to dissent, his name and residence address, the number and classes of shares as to which he dissents and a demand for payment of the fair value of his shares if the action is taken. Such objection is not required from any shareholder to whom the corporation did not give notice of such meeting in accordance with this chapter or where the proposed action is authorized by written consent of shareholders without a meeting.

(b) Within ten days after the shareholders' authorization date, which term as used in this section means the date on which the shareholders' vote authorizing such action was taken, or the date on which such consent without a meeting was obtained from the requisite shareholders, the corporation shall give written notice of such authorization or consent by registered mail to each shareholder who filed written objection or from whom written objection was not required, excepting any shareholder who voted for or consented in writing to the proposed action and who thereby is deemed to have elected not to enforce his right to receive payment for his shares.

(c) Within twenty days after the giving of notice to him, any shareholder from whom written objection was not required and who elects to dissent shall file with the corporation a written notice of such election, stating his name and residence address, the number and classes of shares as to which he dissents and a demand for payment of the fair value of his shares. Any shareholder who elects to dissent from a merger under section 905 (Merger of subsidiary corporation) or paragraph (c) of section 907 (Merger or consoli-

dation of domestic and foreign corporations) or from a share exchange under paragraph (g) of Section 913 (Share exchanges) shall file a written notice of such election to dissent within twenty days after the giving to him of a copy of the plan of merger or exchange or an outline of the material features thereof under section 905 or 913.

(d) A shareholder may not dissent as to less than all of the shares, as to which he has a right to dissent, held by him of record, that he owns beneficially. A nominee or fiduciary may not dissent on behalf of any beneficial owner as to less than all of the shares of such owner, as to which such nominee or fiduciary has a right to dissent, held of record by such nominee or fiduciary.

(e) Upon consummation of the corporate action, the shareholder shall cease to have any of the rights of a shareholder except the right to be paid the fair value of his shares and any other rights under this section. A notice of election may be withdrawn by the shareholder at any time prior to his acceptance in writing of an offer made by the corporation, as provided in paragraph (g), but in no case later than sixty days from the date of consummation of the corporate action except that if the corporation fails to make a timely offer, as provided in paragraph (g), the time for withdrawing a notice of election shall be extended until sixty days from the date an offer is made. Upon expiration of such time, withdrawal of a notice of election shall require the written consent of the corporation. In order to be effective, withdrawal of a notice of election must be accompanied by the return to the corporation of any advance payment made to the shareholder as provided in paragraph (g). If a notice of election is withdrawn, or the corporate action is rescinded, or a court shall determine that the shareholder is not entitled to receive payment for his shares, or the shareholder shall otherwise lose his dissenters' rights, he shall not have the right to receive payment for his shares and he shall be reinstated to all his rights as a shareholder as of the consummation of the corporate action, including any intervening preemptive rights and the right to payment of any intervening dividend or other distribution or, if any such rights have expired or any such dividend or distri-

bution other than in cash has been completed, in lieu thereof, at the election of the corporation, the fair value thereof in cash as determined by the board as of the time of such expiration or completion, but without prejudice otherwise to any corporate proceedings that may have been taken in the interim.

(f) At the time of filing the notice of election to dissent or within one month thereafter the shareholder of shares represented by certificates shall submit the certificates representing his shares to the corporation, or to its transfer agent, which shall forthwith note conspicuously thereon that a notice of election has been filed and shall return the certificates to the shareholder or other person who submitted them on his behalf. Any shareholder of shares represented by certificates who fails to submit his certificates for such notation as herein specified shall, at the option of the corporation exercised by written notice to him within forty-five days from the date of filing of such notice of election to dissent, lose his dissenter's rights unless a court, for good cause shown, shall otherwise direct. Upon transfer of a certificate bearing such notation, each new certificate issued therefor shall bear a similar notation together with the name of the original dissenting holder of the shares and a transferee shall acquire no rights in the corporation except those which the original dissenting shareholder had at the time of transfer.

(g) Within fifteen days after the expiration of the period within which shareholders may file their notices of election to dissent, or within fifteen days after the proposed corporate action is consummated, whichever is later (but in no case later than ninety days from the shareholders' authorization date), the corporation or, in the case of a merger or consolidation, the surviving or new corporation, shall make a written offer by registered mail to each shareholder who has filed such notice of election to pay for his shares at a specified price which the corporation considers to be their fair value. Such offer shall be accompanied by a statement setting forth the aggregate number of shares with respect to which notices of election to dissent have been received and the aggregate number of holders of such shares. If the corporate action has

been consummated, such offer shall also be accompanied by (1) advance payment to each such shareholder who has submitted the certificates representing his shares to the corporation, as provided in paragraph (f), of an amount equal to eighty percent of the amount of such offer, or (2) as to each shareholder who has not yet submitted his certificates a statement that advance payment to him of an amount equal to eighty percent of the amount of such offer will be made by the corporation promptly upon submission of his certificates. If the corporate action has not been consummated at the time of the making of the offer, such advance payment or statement as to advance payment shall be sent to each shareholder entitled thereto forthwith upon consummation of the corporation action. Every advance payment or statement as to advance payment shall include advice to the shareholder to the effect that acceptance of such payment does not constitute a waiver of any dissenters' rights. If the corporate action has not been consummated upon the expiration of the ninety day period after the shareholders' authorization date, the offer may be conditioned upon the consummation of such action. Such offer shall be made at the same price per share to all dissenting shareholders of the same class, or if divided into series, of the same series and shall be accompanied by a balance sheet of the corporation whose shares the dissenting shareholder holds as of the latest available date, which shall not be earlier than twelve months before the making of such offer, and a profit and loss statement or statements for not less than a twelve-month period ended on the date of such balance sheet or, if the corporation was not in existence throughout such twelve month period, for the portion thereof during which it was in existence. Notwithstanding the foregoing, the corporation shall not be required to furnish a balance sheet or profit and loss statement or statements to any shareholder to whom such balance sheet or profit and loss statement or statements were previously furnished, nor if in connection with obtaining the shareholders' authorization for or consent to the proposed corporate action the shareholders were furnished with a proxy or information statement, which included financial statements, pursuant to Regulation 14A or

Regulation 14C of the United States Securities and Exchange Commission. If within thirty days after the making of such offer, the corporation making the offer and any shareholder agree upon the price to be paid for his shares, payment therefor shall be made within sixty days after the making of such offer or the consummation of the proposed corporate action, whichever is later, upon the surrender of the certificates for any such shares represented by certificates.

(h) The following procedure shall apply if the corporation fails to make such offer within such period of fifteen days, or if it makes the offer and any dissenting shareholder or shareholders fail to agree with it within the period of thirty days thereafter upon the price to be paid for their shares:

(1) The corporation shall, within twenty days after the expiration of whichever is applicable of the two periods last mentioned, institute a special proceeding in the supreme court in the judicial district in which the office of the corporation is located to determine the rights of dissenting shareholders and to fix the fair value of their shares. If, in the case of merger or consolidation, the surviving or new corporation is a foreign corporation without an office in this state, such proceeding shall be brought in the county where the office of the domestic corporation, whose shares are to be valued, was located.

(2) If the corporation fails to institute such proceeding within such period of twenty days, any dissenting shareholder may institute such proceeding for the same purpose not later than thirty days after the expiration of such twenty day period. If such proceeding is not instituted within such thirty day period, all dissenter's rights shall be lost unless the supreme court, for good cause shown, shall otherwise direct.

(3) All dissenting shareholders, excepting those who, as provided in paragraph (g), have agreed with the corporation upon the price to be paid for their shares, shall be made parties to such proceeding, which shall have the effect of an action quasi in rem against their shares. The corporation shall serve a copy of the petition in such proceeding upon each dissenting shareholder who is a resident of this state in the manner provided by law for the service of a summons,

and upon each nonresident dissenting shareholder either by registered mail and publication, or in such other manner as is permitted by law. The jurisdiction of the court shall be plenary and exclusive.

(4) The court shall determine whether each dissenting shareholder, as to whom the corporation requests the court to make such determination, is entitled to receive payment for his shares. If the corporation does not request any such determination or if the court finds that any dissenting shareholder is so entitled, it shall proceed to fix the value of the shares, which, for the purposes of this section, shall be the fair value as of the close of business on the day prior to the shareholders' authorization date. In fixing the fair value of the shares, the court shall consider the nature of the transaction giving rise to the shareholder's right to receive payment for shares and its effects on the corporation and its shareholders, the concepts and methods then customary in the relevant securities and financial markets for determining fair value of shares of a corporation engaging in a similar transaction under comparable circumstances and all other relevant factors. The court shall determine the fair value of the shares without a jury and without referral to an appraiser or referee. Upon application by the corporation or by any shareholder who is a party to the proceeding, the court may, in its discretion, permit pretrial disclosure, including, but not limited to, disclosure of any expert's reports relating to the fair value of the shares whether or not intended for use at the trial in the proceeding and notwithstanding subdivision (d) of section 3101 of the civil practice laws and rules.

(5) The final order in the proceeding shall be entered against the corporation in favor of each dissenting shareholder who is a party to the proceeding and is entitled thereto for the value of his shares so determined.

(6) The final order shall include an allowance for interest at such rate as the court finds to be equitable, from the date the corporation action was consummated to the date of payment. In determining the rate of interest, the court shall consider all relevant factors, including the rate of interest which the corporation would have had to pay to borrow money

during the pendency of the proceeding. If the court finds that the refusal of any shareholder to accept the corporate offer of payment for his shares was arbitrary, vexatious or otherwise not in good faith, no interest shall be allowed to him.

(7) Each party to such proceeding shall bear its own costs and expenses, including the fees and expenses of its counsel and of any experts employed by it. Notwithstanding the foregoing, the court may, in its discretion, apportion and assess all or any part of the costs, expenses and fees incurred by the corporation against any or all of the dissenting shareholders who are parties to the proceeding, including any who have withdrawn their notices of election as provided in paragraph (e), if the court finds that their refusal to accept the corporate offer was arbitrary, vexatious or otherwise not in good faith. The court may, in its discretion, apportion and assess all or any part of the costs, expenses and fees incurred by any or all of the dissenting shareholders who are parties to the proceeding against the corporation if the court finds any of the following: (A) that the fair value of the shares as determined materially exceeds the amount which the corporation offered to pay; (B) that no offer or required advance payment was made by the corporation; (C) that the corporation failed to institute the special proceeding within the period specified therefor; or (D) that the action of the corporation in complying with its obligations as provided in this section was arbitrary, vexatious or otherwise not in good faith. In making any determination as provided in clause (A), the court may consider the dollar amount or the percentage, or both, by which the fair value of the shares as determined exceeds the corporate offer.

(8) Within sixty days after final determination of the proceeding, the corporation shall pay to each dissenting shareholder the amount found to be due him, upon surrender of the certificates for any such shares represented by certificates.

(i) Shares acquired by the corporation upon the payment of the agreed value therefor or of the amount due under the final order, as provided in this section, shall become treasury shares or be cancelled as provided in section 515 (Reacquired shares), except that, in the case of a merger or consolidation,

they may be held and disposed of as the plan of merger or consolidation may otherwise provide.

(j) No payment shall be made to a dissenting shareholder under this section at a time when the corporation is insolvent or when such payment would make it insolvent. In such event, the dissenting shareholder shall, at his option:

(1) Withdraw his notice of election, which shall in such event be deemed withdrawn with the written consent of the corporation; or

(2) Retain his status as a claimant against the corporation and, if it is liquidated, be subordinated to the rights of creditors of the corporation, but have rights superior to the non-dissenting shareholders, and if it is not liquidated, retain his right to be paid for his shares, which right the corporation shall be obliged to satisfy when the restrictions of this paragraph do not apply.

(3) The dissenting shareholder shall exercise such option under subparagraph (1) or (2) by written notice filed with the corporation within thirty days after the corporation has given him written notice that payment for his shares cannot be made because of the restrictions of this paragraph. If the dissenting shareholder fails to exercise such option as provided, the corporation shall exercise the option by written notice given to him within twenty days after the expiration of such period of thirty days.

(k) The enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership, except as provided in paragraph (e), and except that this section shall not exclude the right of such shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is unlawful or fraudulent as to him.

(l) Except as otherwise expressly provided in this section, any notice to be given by a corporation to a shareholder under this section shall be given in the manner provided in section 605 (Notice of meetings of shareholders).

(m) This section shall not apply to foreign corporations except as provided in subparagraph (e)(2) of section 907 (Merger or consolidation of domestic and foreign corporations). (Amended by L. 1962, Ch. 834, § 40; L. 1963, Ch. 746, § 15; L. 1965, Ch. 803, §§ 20-22; L. 1982, Ch. 202, §§ 3-9; L. 1982, Ch. 928, §§ 38-40; L. 1986, Ch. 117, § 3.)